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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

SHOWBOAT OPERATING COMPANY,
d/b/a SHOWBOAT HOTEL & CASINO,

Petitioner

v.

BARBARA L. STEINER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MALANI L. KOTCHKA
Counsel of Record for Petitioner
SMITH & KOTCHKA
317 South Sixth Street
Las Vegas, Nevada 89101
(702) 382-1707

QUESTIONS PRESENTED FOR REVIEW

1. Is the supervisor's one-time use of vulgar language, in anger, to a female employee sexual harassment under Title VII when the supervisor used similar vulgar language, in anger, to male employees?

2. Was the supervisor's one-time use of vulgar language welcome?

3. Was the supervisor's one-time use of vulgar language sufficiently severe or pervasive to alter the conditions of Steiner's employment and create an abusive working environment?

4. Was the Showboat's disciplinary action against the supervisor prompt and remedial when the supervisor never used vulgar language to Steiner again?

5. Is the Showboat entitled to judgment in its favor on Steiner's hostile work environment claim under

Title VII because she is entitled to no further remedy under Landgraf v. USI Film Products, ____ U.S. ___, 114 S. Ct. 1483 (1994)?

PARTIES TO THIS PROCEEDING

The Showboat Operating Company is a wholly-owned subsidiary of Showboat, Inc., which is a publicly-traded corporation. Barbara Steiner has died from lung cancer and the District Court has substituted the administrator of her estate as the plaintiff in this action.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES v

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS 1

JURISDICTIONAL STATEMENT 2

STATUTES AND EEOC COMPLIANCE MANUAL 3

STATEMENT OF THE CASE 9

A. Special and Important Reasons for Granting the Petition 9

B. Statement of Facts 19

ARGUMENT 30

A. Trenkle's Vulgar Comment to Steiner Did Not Constitute Sexual Harassment Because Males Were Also Exposed To Such Language 30

PAGE

B. Trenkle's Use of Vulgar Language Was Welcome 42

C. Trenkle's Use of Vulgar Language on December 29, 1988 was not Sufficiently Severe or Pervasive to Alter the Conditions of Steiner's Employment and Create an Abusive Working Environment 44

D. The Showboat Has No Liability Under Title VII Because It Took Prompt Remedial Action on Steiner's Complaint.... 49

E. The Showboat Is Entitled to Judgment on Steiner's Title VII Claim Because

PAGE

No Remedy Is Available

To Steiner 58

CONCLUSION 63

APPENDIX 66

TABLE OF AUTHORITIES

CASES: PAGE

Barrett v. Omaha Nat'l Bank,
726 F.2d 424 (8th Cir. 1984) ...17,52

Dornhecker v. Malibu Grand Prix Corp.,
828 F.2d 307 (5th Cir. 1987) ...17,53

Ellison v. Brady,
924 F.2d 872 (9th Cir. 1991) ...49,51

Fair v. Guiding Eyes for the Blind, Inc.,
742 F. Supp. 151 (S.D.N.Y. 1990) 34

Faris v. Henry Vogt Machine Co.,
813 F.2d 786 (6th Cir. 1987) ...53

Gan v. Kepro Circuit Systems, Inc.,
27 Emp. Prac. Dec. (CCH) ¶32,379 (E.D. Mo. 1982) 43

Garcia v. Elf Atochem N. Am.,
28 F.3d 446 (5th Cir. 1994) 51

Great Am. Fed. Sav. & Loan Ass'n v. Novotny,
442 U.S. 366, 99 S. Ct. 2345 (1979) 2

Guess v. Bethlehem Steel Corp.,
913 F.2d 463 (7th Cir. 1990) ...17,52

CASES: PAGE

Harris v. Forklift Systems, Inc.,
___ U.S. ___, 114 S. Ct. 367
(1993) 16,32
45

Hirschfeld v. New Mexico
Corrections Dep't,
916 F.2d 572 (10th Cir. 1990)...53

International Union, United Auto.,
Aerospace and Agricultural
Implement Workers v. Johnson
Controls, Inc.,
499 U.S. 187, 111 S. Ct. 1196
(1991) 33

Keziah v. W.M. Brown & Son, Inc.,
683 F. Supp. 542 (W.D.N.C.
1988), modified, 888 F.2d 322
(4th Cir. 1989) 17,47

Landgraf v. USI Film Products,
___ U.S. ___, 114 S. Ct. 1483
(1994) 18,19
58,60,64

Los Angeles Dep't of Water and
Power v. Manhart,
435 U.S. 702, 98 S. Ct. 1370
(1978) 34

Meritor Sav. Bank v. Vinson,
477 U.S. 57, 106 S. Ct. 2399
(1986) 16,31
40,44

CASES: PAGE

Miller v. Aluminum Co. of Am.,
679 F. Supp. 495, (W.D. Pa. 1988), aff'd, 856 F.2d 184 (3rd Cir. 1988) 17,48

Miller v. Maxwell's Intern, Inc.,
991 F.2d 583 (9th Cir. 1993) ...60

Padway v. Palches,
665 F.2d 965 (9th Cir. 1982) ...60

Parker v. Board of School Commissioners of Indianapolis,
729 F.2d 524 (7th Cir. 1984) ...41

Reynolds v. Atlantic City Convention Center,
53 Fair Emp. Prac. Cas. (BNA) 1852 (D.N.J. 1990), aff'd, 54 Fair Emp. Prac. Cas. (BNA) 1560 (3rd Cir. 1991) 17,47

Rivers v. Roadway Express, Inc.,
___ U.S. ___, 114 S. Ct. 1510 (1994) 59

Shah v. Mt. Zion Hospital & Medical Ctr.,
642 F.2d 268 (9th Cir. 1981) ...60

Steiner v. Showboat Operating Co.,
25 F.3d 1459 (9th Cir. 1994) ...14,15 37,39,42 45,46,54 57,58,62

CASES: PAGE

Swentek v. USAIR, Inc.,
830 F.2d 552 (4th Cir. 1987) ...17,52

Walker v. Sullair Corp.,
736 F. Supp. 94 (W.D.N.C.
1990), modified, 946 F.2d 888
(4th Cir. 1991) 34,43

Wendorf v. Metropolitan Life
Ins. Co.,
47 Empl. Prac. Dec. (CCH)
¶38,316 (E.D.N.Y. 1988) 35

Williams v. United States General
Services Admin.,
905 F.2d 308 (9th Cir. 1990) ...60

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

APPENDIX PAGES

Ninth Circuit Court of Appeals Order Denying Petition for Rehearing (unpublished) 67-69

Ninth Circuit Court of Appeals Opinion 25 F.3d 1459 (9th Cir. 1994) 70-102

United States District Court for the District of Nevada Order (unpublished) 103-154

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Ninth Circuit filed and entered its Judgment in this matter on June 10, 1994, affirming in part, reversing in part and remanding an order entering summary judgment for the Showboat by the United States District Court for the District of Nevada. The Showboat's petition for rehearing was denied on July 21, 1994. Pursuant to 28 U.S.C. § 1254(1) (1993), this Court has jurisdiction to review the Judgment and Opinion upon writ of certiorari. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 99 S. Ct. 2345 (1979).

STATUTES AND EEOC COMPLIANCE MANUAL

PAGE

42 U.S.C. § 2000e et seq. 10

"It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; ...."

42 U.S.C. § 2000e-2(a)(1) (1994) 31

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with

reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(e) of this title."

42 U.S.C. § 2000e-5(g) (1994) 60

"Similarly some forms of verbal

conduct (such as specific words or some jokes) may involve sex or sexuality without discriminating on the basis of sex. That is, such conduct does not treat one sex either more or less favorably than the other sex. Without such disparate treatment, unwelcome verbal conduct of a sexual nature is not sex discrimination and, consequently, cannot be sexual harassment." EEOC Compliance Manual (CCH)
§ 615.6(a)(1) (1988) 41

"The victim can of course put the employer on notice by filing a charge of discrimination. As the Commission stated in its Vinson brief, the filing of a charge triggers a duty to investigate and remedy any ongoing illegal activity. It is important to emphasize that an

employee can always file an EEOC charge without first utilizing an internal complaint or grievance procedure, and may wish to pursue both avenues simultaneously because an internal grievance does not prevent the Title VII charge-filing time period from expiring. Nor does a filing of an EEOC charge allow an employer to cease action on an internal grievance or ignore evidence of ongoing harassment. Indeed, employers should take prompt remedial action upon learning of evidence of sexual harassment (or any other form of unlawful discrimination), whether from an EEOC charge or an internal complaint. If the employer takes immediate and appropriate action to correct the harassment and prevent its recurrence, and the Commission determines that no further

action is warranted, normally the Commission would administratively close the claim." EEOC Compliance Manual (CCH) ¶ 3112 (1988) (footnotes omitted) 55

STATEMENT OF THE CASE

A. Special and Important Reasons for Granting the Petition

In her November 15, 1990 Complaint (CR 1)[1], Steiner alleged that her shift boss sexually harassed her, that the Showboat retaliated against her for filing a complaint with the Nevada Equal Rights Commission, that the Showboat constructively discharged her, that she had been subjected to age discrimination (a claim she voluntarily dismissed with prejudice [CR 30]) and that the Showboat intentionally inflicted emotional distress upon her. Federal jurisdiction

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[1]"CR" refers to the civil docket number of the Certificate of Record of the Clerk for the United States District Court for the District of Nevada. "SR" refers to the Appellee's Supplemental Excerpts of Record filed with the Ninth Circuit Court of Appeals. "ER" refers to the Appellant's Supplemental Excerpts of Record filed with the Ninth Circuit Court of Appeals. "APP" refers to the Appendix of this Petition for Writ of Certiorari.

was based on Title VII, 42 U.S.C. § 2000e et seq., and pendent jurisdiction.

After discovery, the Showboat filed its motion for summary judgment on October 8, 1991. CR 33. The District Court granted the motion in September 1992, finding:

> The essence of a sexual harassment claim under Title VII is that an employee is intentionally singled out for adverse treatment on the basis of certain prohibited criteria; in this case the criterion is sex. To establish sex-based discrimination, Steiner must demonstrate that, but for the fact of her sex, she would not have been the object of harassment. If the comments or

conduct underlying an alleged sexual harassment claim are not linked in any way to the recipient's sex, there has been no disparate treatment under Title VII. Thus, to prove a sexual harassment claim based on a hostile work environment, Steiner must show that she was treated differently than similarly situated male employees at the Showboat. Steiner has made no such showing.

. . . .

While Trenkle's comment may have referred to a sexual act, that does not make it sex discrimination. While not bound by its provisions, the

court may properly look to guidelines issued by the EEOC for guidance when examining "hostile environment" claims of sexual harassment. Ellison, 924 F.2d at 876; see Meritor Sav. Bank, 477 U.S. at 65, 106 S. Ct. at 2404-05. The EEOC Compliance Manual indicates that

> some forms of verbal conduct (such as specific words or some jokes) may involve sex or sexuality without discriminating on the basis of sex. That is, such conduct does not

> treat one sex either more or less favorably than the other sex. Without such disparate treatment, unwelcome verbal conduct of a sexual nature is not sex discrimination and, consequently, cannot be sexual harassment.

EEOC Compliance Manual (CCH) § 615.6 (1988). In this case, Trenkle's remark to Steiner on December 29, 1988 referred to sex without discriminating on the basis of sex. Trenkle called numerous male employees by derogatory names and used

> vulgar language with both male and female employees. As Steiner has failed to prove that the alleged harassment was based on, or would not have occurred but for her sex, the Showboat is entitled to judgment as a matter of law on Steiner's claim of sexual harassment under Title VII.

CR 44; APP 128-29, 131-33.

On June 10, 1994, the Ninth Circuit affirmed the summary judgment on the retaliation and constructive discharge claims under Title VII but reversed on the hostile work environment claim under Title VII and the state intentional infliction of emotional distress claim. Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994); APP 70-102.

The Ninth Circuit found that the language Trenkle used toward women was "gender-based" and even if he used "sexual epithets equal in intensity and in an equally degrading manner against male employees," he could not "cure" his conduct toward women. 25 F.3d at 1464; APP 85-86. The Ninth Circuit concluded, "And finally, although words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that both men and women working at Showboat have viable claims against Trenkle for sexual harassment." Id. at 1464 (original emphasis); APP 86. The Ninth Circuit's conclusion, on an important federal question, that sexual epithets to both males and females constitutes sex discrimination against females (and its

suggestion that these epithets may also constitute sex discrimination against males) is contrary to the very definition of "discrimination" and in conflict with this Court's decision in Meritor Sav. Bank v. Vinson, 477 U.S. 57, 106 S. Ct. 2399 (1986).

Further, the Ninth Circuit's application in this case of a "reasonable woman standard," despite this Court's adoption of a reasonable person standard in Harris v. Forklift Systems, Inc., _ U.S. _____, 114 S. Ct. 367 (1993), demonstrates that the Ninth Circuit has decided a federal question in a way that conflicts with an applicable decision of this Court.

The Ninth Circuit's decisions here that the vulgar language was severe and pervasive and that the Showboat did not

promptly and adequately remedy the vulgar language also conflict with other United States Court of Appeals decisions on these same issues. See Guess v. Bethlehem Steel Corp., 913 F.2d 463 (7th Cir. 1990); Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987); Barrett v. Omaha Nat'l Bank, 726 F.2d 424 (8th Cir. 1984); Reynolds v. Atlantic City Convention Center, 53 Fair Emp. Prac. Cas. (BNA) 1852 (D.N.J. 1990), aff'd, 54 Fair Emp. Prac. Cas. (BNA) 1560 (3rd Cir. 1991); Keziah v. W.M. Brown & Son, Inc., 683 F. Supp. 542 (W.D.N.C. 1988), modified, 888 F.2d 322 (4th Cir. 1989); Miller v. Aluminum Co. of Am., 679 F. Supp. 495, 502 (W.D. Pa. 1988), aff'd, 856 F.2d 184 (3rd Cir. 1988). Trenkle never again

used vulgar language to Steiner after the Showboat's initial response to her complaint. These issues are of widespread general impact and public importance. Uniformity of federal law in this area of volatile litigation needs to be secured.

On June 23, 1994, the Showboat petitioned the Ninth Circuit for rehearing on the Title VII hostile work environment claim because this Court's intervening decision in Landgraf v. USI Film Products, ___ U.S. ___, 114 S. Ct. 1483 (1994), eliminated any potential remedies under the 1991 Civil Rights Act. The Showboat argued that this precluded Steiner from recovering any damages for her hostile work environment claim and rendered her entire Title VII hostile work environment claim moot since she had

already received her full requested remedy. SR 70. Steiner lost no wages and no work and she received each and every equitable remedy she originally requested from the Nevada Equal Rights Commission. SR 29, 70; CR 38, Defendant's Exhibit 8. The Ninth Circuit denied the petition for rehearing, saying that the District Court should address the remedy issue before the appellate court considered it. APP 67-69. Since the law is now clear, however, after this Court's Landgraf decision, the Ninth Circuit should have affirmed the judgment for the Showboat on Steiner's moot hostile work environment claim under Title VII.

B. Statement of Facts

Jack Trenkle, a 31-year Showboat

casino employee, had worked his way up to Vice President/Assistant Casino Manager. SR 1-2, 161. Steiner's employment at the Showboat started on March 1, 1986, first as a 21 dealer and two months later, as a floorperson. CR 38; SR 110. Steiner, a former legal secretary for years, had become a dealer to make more money despite her belief that casino management in general was comprised of low class people. SR 106-109, 173. Trenkle was Steiner's shift boss on the swing shift in December 1988. SR 68. Both Steiner and Trenkle were aware of the Showboat's written rule against using insulting or obscene language to fellow employees, supervisors or guests. SR 3-8, 81, 111.

Despite the written rule, Steiner was legendary for talking like a "drunken sailor". SR 9. Steiner admitted

sleeping with one of her subordinate employees, John Casey, even though she knew he was living with another woman. CR 35, Exhibit 11, p. 18, and CR 38, p. 196. She discussed her sexual relationships with John Casey "in detail" while at work and she both told and listened to dirty jokes and comments that contained derogatory language. SR 9-14, 91. She acknowledged that, when she worked at another casino in 1980, the manager there called her "Boom Boom" because of her large breasts and that she put "Boom 1" on her specialty license plate because she thought it was cute. SR 179-180. At the Showboat, she commented to a fellow floorperson, "After I die, I want to come back as a man so I can fuck over women" (SR 15, 183) and, referring to a new dealer with lumps on

his arms: "I wonder if his dick is as lumpy as his arm." SR 15.

Steiner used the words "fuck", "cunt" and "bitch". She told her coworkers on more than one occasion that she loved to give "head", that she was great at it and that it was her specialty. SR 15-16, 146, 182. When one of Steiner's subordinates refused to sign a warning notice she was attempting to issue, she said to him, "You're not going to fucking sign this-get the fuck out of here." A customer overheard these remarks and commented on Steiner's language. SR 17, 182. Steiner referred to Trenkle as a "bastard" and, several times in the employee cafeteria in front of others, as an "asshole." SR 19-20, 183.

Trenkle had used vulgar language

with both sexes and often treated them both in a similarly deprecating manner. SR 18, 19; ER 2-9, 18. While certainly not defensible, he yelled at both male and female employees (ER 2, 8, 10, 14, 16) and used profanity and vulgarity with everyone. SR 90, 94. Steiner advanced hearsay evidence that Trenkle had called Steiner both sex-specific and non sex-specific names to others, but the Ninth Circuit's apparent perception that Trenkle stated such things to Steiner directly is denied by Steiner herself and the alleged statements are not relevant to this suit. CR 38, pp. 47-48.

Trenkle never made a sexual advance to Steiner and never requested a sexual favor from her. SR 126. He never touched her or asked her out on a date. In fact, Steiner's primary complaint was

that "Trenkle always avoided me" (SR 127) and "would never talk to me." CR 38, p. 191. Against this background, Steiner's Title VII hostile work environment claim is based entirely on a single instance of Trenkle's use of vulgar language on December 29, 1988.[2] SR 67.

The Showboat, like other hotel casinos, frequently provides good customers with complimentary food and/or drinks. Steiner had authority to "comp" customers in this manner and, on December 29, 1988, "comped" two individuals who had been denied complimentary food by another casino supervisor. ER 58. According to Steiner, when Trenkle found out about the "comp," he became angry

---

[2]On her intake questionnaire filed with the Nevada Equal Rights Commission, Steiner complained of "harassment" and "sexual harassment" which occurred on "12-29-88". SR 67.

"red in the face" and said: "Bradley in poker told me they came to him for a comp and he said no, and they said, 'we can go to that dumb broad in 21, and she will comp us.' That's you, Steiner." Steiner told Trenkle that she had a right to comp them since they "bought in" for $100.00 and played for half an hour and lost. Trenkle then allegedly said, "You are not a fucking floor man. You are a fucking casino host. You comp every fucking fleabag that walks through the door." ER 58. Steiner denied that she comped players more than anybody else did. ER 59. Trenkle walked away but then came back and screamed, "Why don't you go in the restaurant and suck their dicks while you are at it if you want to comp then so bad." ER 59.

Trenkle admitted the essence of the

last statement, alleging he made it in response to Steiner's statement that: "I'll be goddamned .... Rosie can tell people to go get fucked and I take somebody into the restaurant to eat and I get my as[s] ate out." SR 24-26, 77-78. He testified that he made the remark out of anger (SR 79-80, 83-84) and that: "I would have said the same thing to a man.... Men and women are alike to me." SR 24-25 (emphasis added). Trenkle further testified: "I wish to Christ I never said it now but I already did." SR 79. The words he used were no worse, however, than the words he had heard Steiner use. SR 83. Steiner testified she was upset because Trenkle had screamed at her in front of people. SR 127, 176.

The next day, December 30, 1988,

Steiner complained to both Executive Vice President Cliff Taylor and Vice President/Casino Manager Pete Amante that Trenkle had used explicit language. ER 60-61; SR 27-28, 161-162. Taylor told Steiner that he was sorry the incident had happened, that the Showboat did not condone this type of behavior, and that he and Amante would take care of the situation. ER 61-62; SR 27-28. Later that day, on questioning by Amante, Trenkle admitted using the language and Amante ordered Trenkle to apologize to Steiner and leave her alone or he would be fired. SR 28, 85-86. Trenkle apologized to Steiner that afternoon (SR 86) and thereafter never spoke to her again. ER 63.

Nevertheless, on March 2, 1989, over two months later, Steiner filed a charge

with the Nevada Equal Rights Commission ("NERC") alleging that she had been sexually harassed by Trenkle on December 29, 1988, and that her sex was the sole reason for the harassment. ER 1; SR 67. Steiner requested as a remedy from NERC that Trenkle cease harassing her, that her work environment be free from hostility, that Trenkle be disciplined according to company policy and that the Showboat not retaliate against her. SR 29-30. On the same day she filed her charge, a security guard told Steiner, "We were told by upstairs to watch over you to see that Jack Trenkle [does] not harass you ...." SR 175-176.

The Showboat investigated Steiner's charge and obtained affidavits from all swing shift dealers and floorpersons, including Steiner. SR 120-121, 123-124.

As a result, and in compliance with Steiner's remedy request, the Showboat issued Trenkle the following disciplinary reprimand on April 21, 1989:

> In accordance with company policy, Jack, you are being reprimanded for sexually harassing Barbara Steiner. If you ever use derogatory, sexual, obscene or offensive language to or about any employee again, you will be terminated.
>
> You must stay away from and not talk to Barbara Steiner. Your shift will be changed. Your days off may be changed. You will not receive your quarterly bonus for the first quarter of 1989.

ER 20 (emphasis added).

Trenkle's shift was changed from swing shift to graveyard. ER 55; SR 121-122. On April 20, 1989, the Showboat em[illegible] them that it continued [illegible]orce its no-harassment policy and on October 5, 1989, the Showboat held a seminar on sexual harassment which Steiner did not attend. SR 23, 163. By April 1989, the Showboat had fully complied with Steiner's NERC remedy r[illegible] SR 70.

ARGUMENT

A. Trenkle's Vulgar Comment to Steiner Did Not Constitute Sexual Harassment Because Males Were Also Exposed To Such Language.

Title VII of the Civil Rights Act of

1964 makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1) (1994). If women are required to work in a discriminatorily hostile or abusive environment <u>while men are not</u>, then sex discrimination has occurred. <u>Meritor Sav. Bank v. Vinson</u>, 477 U.S. 57, 106 S. Ct. 2399 (1986). Here, no discrimination occurred because of Steiner's sex. In <u>Meritor</u>, the Court through Justice Rehnquist said, "Without question, when a supervisor sexually harasses a subordinate <u>because of the subordinate's sex,</u> that supervisor 'discriminate[s]' on

the basis of sex." 477 U.S. at 64, 106 S. Ct. at 2404 (emphasis added). In his concurring opinion in Harris v. Forklift Systems, Inc., ___ U.S. ____, 114 S. Ct. 367, 372 (1993) (Scalia, J., concurring), Justice Scalia wrote that the test is "whether working conditions have been discriminatorily altered." Similarly, Justice Ginsberg said:

> Today the Court reaffirms the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57, 66, 106 S. Ct. 2399, 2405, 91 L.Ed.2d 49 (1986): "[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." The critical

> issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.

Id. (Ginsberg, J., concurring) (emphasis added). Here, Steiner was not exposed to a disadvantageous condition of employment to which men were not exposed.

This Court has held that a simple test for determining whether unlawful sex discrimination occurred is "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" International Union, United Auto., Aerospace and Agricultural Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 200, 111 S.

Ct. 1196, 1204 (1991); Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 711, 98 S. Ct. 1370, 1377 (1978) (quoting Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1170 (1971)). Thus, it is treatment of an employee that would not have occurred if the sex of the employee was different that is an illegal condition of employment under Title VII. See Fair v. Guiding Eyes for the Blind, Inc., 742 F. Supp. 151 (S.D.N.Y. 1990) (plaintiff failed to prove that alleged harassment was based on her sex where the supervisor referred to a man as a "bitch" and made various remarks regarding homosexuality because the supervisor's comments had nothing to do with plaintiff's gender); Walker v. Sullair

Corp., 736 F. Supp. 94 (W.D.N.C. 1990), modified, 946 F.2d 888 (4th Cir. 1991) (no Title VII liability because supervisor harassed employees on a sex neutral basis); Wendorf v. Metropolitan Life Ins. Co., 47 Empl. Prac. Dec. (CCH) ¶38,316 (E.D.N.Y. 1988) (supervisor's physical touching of both male and female workers, although annoying, was not sexual harassment).

The sole basis of Steiner's claim of sexual harassment was the vulgar language used on December 29, 1988. SR 67. To be the basis of a valid sexual harassment claim under Title VII, the vulgar language must have been based on Steiner's sex. It was not. Trenkle made the remark to Steiner out of anger because he did not agree with Steiner's decision to "comp" two customers.

Further, he made the comment in response to Steiner's own vulgarity. It was Steiner's decision about the comp and her own rough language that prompted Trenkle's comment, not Steiner's sex. Trenkle said he "would have said the same thing to a man." SR 24.

Trenkle did not use any gender-based epithets on December 29, 1988. More important, there is no evidence that he would not have yelled at Steiner in the same manner had she been a man. The undisputed evidence is that Trenkle called males as well as females by derogatory names, used vulgar language with both sexes and treated them both in a similarly deprecating manner. SR 19-20, 60-63.

When the Ninth Circuit analyzed Steiner's retaliation claim, it used

classic discrimination theory and found that at least two males had received worse marks than Steiner on their employment evaluations and, therefore, there was no retaliation. 25 F.3d at 1465; APP 93. Yet, when it analyzed the sexual harassment claim, it wrote that possibly both men and women had viable claims against Trenkle for sexual harassment. 25 F.3d at 1464; APP 86. That makes no sense. It is not sexual harassment if no distinction was made on the basis of their sex.

The Ninth Circuit distinguished some of Trenkle's comments about male employees, finding they did not contain gender-based terms, from some he allegedly made to people other than Steiner about female employees. 25 F.3d at 1463-64; APP 84-85. That analysis is

wrong. The issue is whether Steiner was treated in a disparate manner by Trenkle because of her sex. She was not. The subject of her charge and lawsuit is Trenkle's admitted comment on the night of December 29, 1988, when Trenkle used no gender-based terms with Steiner. It was her exposure to that single comment which is the basis of her claim. Yet, there is no dispute that male employees were exposed to precisely the same type of language. Steiner was not treated differently than similarly situated males. Moreover, it was not the content of Trenkle's speech that upset Steiner. It was the fact that Trenkle screamed at her in public. SR 127.

Steiner never argued before either the District Court or the Ninth Circuit that any "gender-specificity" of

Trenkle's comments constituted the basis for her charge of discrimination. If both men and women have viable claims against Trenkle for sexual harassment as suggested by the Ninth Circuit, then no sex discrimination occurred. To Trenkle, men and women were alike. SR 25.

Although Trenkle's comment to Steiner referred to a sexual act, that reference does not make the comment sexual harassment. Trenkle was not asking or ordering Steiner to actually perform oral sex on the two customers and Steiner never alleged otherwise. The Ninth Circuit's comment that Trenkle "suggested" that Steiner have sex with customers is inaccurate. Steiner, 25 F.3d at 1464; APP 85. The language used was an angry reaction and would have been used to a man. SR 24.

While not bound by its provisions, this Court may look at the Guidelines issued by the Equal Employment Opportunity Commission ("EEOC") for guidance when examining "hostile environment" claims of sexual harassment. Meritor, 477 U.S. at 65, 106 S. Ct. at 2404-05. The EEOC Compliance Manual states that:

> ... some forms of verbal conduct (such as specific words or some jokes) may involve sex or sexuality without discriminating on the basis of sex. That is, such conduct does not treat one sex either more or less favorably than the other sex. Without such disparate treatment, unwelcome verbal conduct of a sexual

> nature is not sex discrimination and, consequently, cannot be sexual harassment.

EEOC Compliance Manual (CCH) § 615.6(a)(1) (1988) (emphasis added). In this case, Trenkle's remark to Steiner on December 29, 1988 referred to sex (the act) without discriminating on the basis of sex (her gender). Although Trenkle's comment should not have been made in the workplace, the Court's task is not to assess the morality or political correctness of the comment but rather to determine whether it was a violation of Title VII. See Parker v. Board of School Commissioners of Indianapolis, 729 F.2d 524, 529 (7th Cir. 1984). Since Trenkle used vulgar language when referring to male and female employees, Steiner failed

to prove that the alleged harassment would not have occurred but for her sex and the Showboat is entitled to judgment as a matter of law on Steiner's claim of sexual harassment under Title VII.

B. Trenkle's Use of Vulgar Language Was Welcome.

The Ninth Circuit rejected out of hand the Showboat's assertion that Steiner welcomed Trenkle's harassment because she herself talked like a "drunken sailor" since there was no suggestion in the record that Trenkle's remarks were, in fact, welcomed. 25 F.3d at 1464 n.5; APP 87. Yet, it was Steiner's use of vulgar language which provoked Trenkle's retort. SR 24-26, 77-78. The angry comment was similar to the one Steiner herself used when she was

disciplining a subordinate: "Get the fuck out of the pit." SR 181-182. Such language, along with referring to a human resources representative as a "bitch" (SR 64, 146) and to other women as "[illegible]" and "bitch", cannot help but be relevant to the welcomeness issue. See Gan v. Kepro Circuit Systems, Inc., 27 Emp. Prac. Dec. (CCH) ¶32,379 (E.D. Mo. 1982) (plaintiff's regular use of crude and vulgar language showed that the allegedly harassing conduct was substantially welcomed and encouraged by the plaintiff since she actively contributed to the distasteful working environment by her own profane and sexually suggestive conduct). In Walker, 736 F. Supp. at 98, the court found that the employee had discussed freely and openly her sex life and sexual fantasies, she engaged in

sexually suggestive telephone conversation during work hours and she sometimes used vulgar or offensive language in the workplace. Steiner's initiation of sexual banter and remarks in the workplace shows that Trenkle's comment to her was welcome.

C. Trenkle's Use of Vulgar Language on December 29, 1988 was not Sufficiently Severe or Pervasive to Alter the Conditions of Steiner's Employment and Create an Abusive Working Environment.

In Meritor, this Court said that for sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working

environment. A mere isolated utterance is not enough. 477 U.S. at 67, 106 S. Ct. at 2405. In Harris, this Court taught: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview." 114 S. Ct. at 370. Here, the Ninth Circuit used its reasonable woman standard without mention of Harris' teaching. Moreover, it applied that standard only to "allegations of ongoing, sexually derogatory behavior." (Emphasis added.) Steiner did not allege any "ongoing, sexually derogatory behavior" by Trenkle to her and yet, the Ninth Circuit found that Steiner suffered severe and pervasive sexual harassment. 25 F.3d at

1463 n.4; APP 83. The only basis for Steiner's Title VII charge was the "harassment" which occurred on "12-29-88". SR 67. As to that, Steiner admitted that Trenkle apologized and never talked to her again. SR 117. Even, the Ninth Circuit acknowledged that Trenkle's "sexual harassment had been halted some time before she quit." 25 F.3d at 1466.

Trenkle's remark on December 29, 1988 was isolated and, given Steiner's conduct, trivial. It was crude, unpleasant and certainly not to be condoned, but it was not pervasive or severe. It was an isolated epithet. Steiner lost her temper and swore at a subordinate over a work related issue. Trenkle did the same to Steiner. Such angry remarks may be wrong. They may

themselves lead to workplace discipline but they should not lead to federal liability.

Other circuits would not have found this statement to constitute severe or pervasive conduct. In Keziah, 683 F. Supp. 542, the court granted summary judgment, holding that two boorish comments of a sexual joke and asking the plaintiff if she would like to show her scars from breast surgery did not create an intimidating, hostile or offensive working environment. In Reynolds, 53 Fair Empl. Prac. Cas. (BNA) 1852, the court granted summary judgment because the female employee's allegations that one male worker grabbed and shook his crotch on one occasion and gave her the finger several other times, that a co-worker called her a "cunt" and that

another co-worker called her a "douche bag cunt" showed isolated rather than pervasive sexual harassment. The court found a general use of obscenity by the employee and her co-workers and a refusal by some of her male co-workers to work for her when she was a supervisor. In these circumstances the alleged harassment, even though sexual, was occasional, isolated or trivial and not persistent.

In Miller, 679 F. Supp. at 502, the court granted the employer summary judgment because a remark about the plaintiff's breasts did not suffice to create an atmosphere pervaded by sexual harassment. Trenkle's remark in December 1988 was not severe or pervasive. A reasonable person would not find Trenkle's comment to be sufficiently

severe or pervasive as to alter her work environment.

D. The Showboat Has No Liability Under Title VII Because It Took Prompt Remedial Action on Steiner's Complaint.

The Ninth Circuit standard, as set forth in Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991), is that remedies should be reasonably calculated to end the harassment. Not all harassment warrants dismissal; remedies should be assessed proportionately to the seriousness of the offense. Id. at 881-82. The Ninth Circuit said:

> The record on appeal suggests that Ellison's employer did not express strong disapproval of Gray's conduct, did not

> reprimand Gray, did not put him on probation, and did not inform him that repeated harassment would result in suspension or termination. Cf. Swentek, 830 F.2d 552; Barrett, 726 F.2d 424. Apparently, Gray's employer only told him to stop harassing Ellison. Title VII requires more than a mere request to refrain from discriminatory conduct. DeGrace v. Rumsfeld, 614 F.2d 796, 805 n.5 (1st Cir. 1980). Employers send the wrong message to potential harassers when they do not discipline employees for sexual harassment.

Id. at 882 (footnotes omitted). Here,

the Showboat did everything the employer did not do in Ellison. It reprimanded Trenkle, it expressed strong disapproval of his conduct and it told him that if he ever again used sexual or derogatory language, he would be fired. Under the Ellison standard, that was sufficient.

"[T]he reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment." Id. at 882. The Showboat's remedy was reasonably calculated to stop Trenkle and it did. See also Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451 (5th Cir. 1994) (employer entitled to summary judgment because its actions in response to employee's complaint of hostile environment sexual harassment were prompt and reasonably calculated to end the harassment, and

"the harassment actually ended"); Barrett v. Omaha Bank, 726 F.2d 424 (8th Cir. 1984) (employer's reprimand of employee and warning him that any further misconduct would result in discharge was sufficient); Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987) (airline was not liable under Title VII for a hostile sexual work environment where the employer issued a written warning to the pilot for using foul language, warned him that he would be suspended if there were any further complaints and instructed him to stay away from the plaintiff); Guess v. Bethlehem Steel Corp., 913 F.2d 463 (7th Cir. 1990) (employer was not liable for sexual harassment where it reprimanded the foreman, ordered him to

stay away from the plaintiff and later denied him a promotion and a merit increase); Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572 (10th Cir. 1990) (employer was not liable for supervisor's conduct where it demoted him because of his sexual advances toward the plaintiff); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987) (employer not liable under Title VII because it told complaining employee that she would not have to work with harassing employee again); Faris v. Henry Vogt Machine Co., 813 F.2d 786 (6th Cir. 1987) (summary judgment affirmed where employer implemented measures to remedy any possible confrontations between the plaintiff and her co-workers).

The Ninth Circuit's finding of deficiency in the Showboat's remedy is

based solely on the speed of implementing the remedy.[3] The court said the Showboat "was consistently slow to react to Steiner's claims, it did not seriously investigate them or strongly reprimand Trenkle until after Steiner had filed her complaint with the NERC." 25 F.3d at 1464; APP 88. Yet, NERC was created for this very reason. The EEOC Guidelines provide:

> The victim can of course put the employer on notice by filing a charge of discrimination. As the

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[3]While the Ninth Circuit suggested further inadequacy because the Showboat allegedly changed Steiner's shift to remedy the December 29, 1988 comment (25 F.3d at 1464; APP 88), the Ninth Circuit is in error. There is no record evidence to support that finding and, to the contrary, the same decision correctly states earlier that "Trenkle's shift was changed so that he and Steiner would no longer be at work during the same hours." Id. at 1462 (emphasis added); APP 75.

> Commission stated in its Vinson brief, the filing of a charge triggers a duty to investigate and remedy any ongoing illegal activity . . . . If the employer takes immediate and appropriate action to correct the harassment and prevent its recurrence, and the Commission determines that no further action is warranted, normally the Commission would administratively close the case.

EEOC Compliance Manual (CCH) ¶3112 (1988) (emphasis added).

The Showboat did not know that Steiner wanted further action to be taken against Trenkle until she filed her charge of discrimination with NERC. SR

118-119. When she did, the Showboat promptly investigated further by interviewing and obtaining affidavits from every dealer and floorperson on the swing shift. It do so as fast as it could. SR 64-66. During the investigation, Trenkle did not talk to Steiner. When it completed the investigation, it provided every remedy Steiner requested in the charge: that Trenkle cease harassing her, that her work environment be free from hostility, that Trenkle be disciplined according to company policy and that the Showboat not retaliate against her. SR 29. That was done. SR 70. As a matter of law, the Showboat's action was prompt and remedial.

An employer should not become liable under Title VII because it took stronger

action against a supervisor at a later date in order to appease the complaining employee and not because the original remedy was insufficient to end the harassment of the employee. Trenkle never spoke to Steiner after the Showboat told Trenkle to apologize to Steiner and to leave her alone or he would be fired. The Showboat's initial remedial steps were completely effective. Even the Ninth Circuit acknowledged "that Steiner had effectively petitioned Showboat management and the NERC for relief from Trenkle's harassment, in the sense that his sexual harassment had been halted sometime before she quit." 25 F.3d at 1466; APP 96. The Showboat should not be held liable under Title VII since it stopped any harassment against Steiner by Trenkle.

E. The Showboat is Entitled to Judgment on Steiner's Title VII Claim Because No Remedy Is Available to Steiner.

Although it found that Steiner was not constructively discharged, the Ninth Circuit held that the fact that Steiner quit her job could weigh into her proof of "damages for sexual harassment." 25 F.3d at 1466; APP 98. Yet, Steiner is not entitled to any damages for sexual harassment. In Landgraf, this Court held that Section 102 of the Civil Rights Act of 1991 "confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged, and the novel prospect of damages liability for their employers." 114 S. Ct. at 1506. This Court said,

"Neither in Bradley itself, nor in any case before or since in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment", and held that neither compensatory nor punitive damages may be recovered under Section 102 of the 1991 Act for "conduct occurring before November 21, 1991." 114 S. Ct. at 1506-07. Accord Rivers v. Roadway Express, Inc., ___ U.S. ___, 114 S. Ct. 1510 (1994).

Steiner's case arose before the Civil Rights Act of 1991 was enacted. Trenkle's comment occurred on December 29, 1988. Steiner filed her charge of a hostile work environment under Title VII on March 2, 1989, and she filed her

Complaint alleging a violation of Title VII on November 15, 1990.

Before the 1991 Civil Rights Act, compensatory damages, damages for emotional distress and punitive damages were not available in the Ninth Circuit under Title VII. Miller v. Maxwell's Intern. Inc., 991 F.2d 583, 587 n.2 (9th Cir. 1993); Williams v. United States General Services Admin., 905 F.2d 308, 311 (9th Cir. 1990); Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982); Shah v. Mt. Zion Hospital & Medical Ctr., 642 F.2d 268, 272 (9th Cir. 1981); accord 42 U.S.C. § 2000e-5(g) (1994). In Landgraf, this Court said:

> Section 102 also allows monetary relief for some forms of workplace discrimination that would not previously have

> justified any relief under Title VII. As this case illustrates, even if unlawful discrimination was proved, under prior law a Title VII plaintiff could not recover monetary relief unless the discrimination was also found to have some concrete effect on the plaintiff's employment status, such as a denied promotion, a differential in compensation, or termination.

114 S. Ct. at 1491 (emphasis added). Steiner did not suffer any concrete effect on her employment status. SR 29, 70. She lost no wages or benefits and she lost no promotion. As a remedy for the hostile environment, she asked only that Trenkle cease harassing her, that he

be disciplined and that the Showboat not retaliate against her. SR 29. She received her full remedy prior to filing her lawsuit. SR 70; CR 38, Defendant's Exhibit 8.

Although she did not request any injunctive relief, any request for injunctive relief would be moot. The Ninth Circuit held that, "Taken together, these facts suggest that Steiner had effectively petitioned Showboat management and the NERC for relief from Trenkle's harassment, in the sense that his sexual harassment had been halted some time before she quit." Steiner, 25 F.3d at 1466; APP 96. Since no further remedy is possible for Steiner under Title VII, Steiner's claim of hostile environment sexual harassment under Title VII fails because it is moot and the

Showboat should be granted judgment as a matter of law.

CONCLUSION

This Court should grant the instant Petition for Writ of Certiorari and resolve the question of whether sexual harassment occurs under Title VII when a supervisor angrily uses vulgar language to both male and female employees. A cause of action should not hinge on a microscopic analysis of the specific words used to determine if they are "gender-based", especially when most of the language used was not and was directed to "men and women alike". Further, this Court should resolve whether an employer's stopping any further vulgar language from occurring to the complaining employee by the offending

supervisor constitutes prompt remedial action under Title VII. Finally, this Court should resolve that its holding in Landgraf v. USI Film Products entitles the Showboat to judgment in its favor on Steiner's hostile work environment claim because there is no remedy available to her under Title VII and her claim is moot.

The Ninth Circuit disregarded the meaning of discrimination under Title VII, the purpose of prompt remedial action by an employer on an employee's complaint of hostile environment sexual harassment and the scope of this Court's Landgraf decision. The issues involved

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here will have far reaching ramifications which should be settled by this Court.

DATED this 19th day of October, 1994.

Respectfully submitted,

SMITH & KOTCHKA

By: Malani L. Kotchka

Malani L. Kotchka
317 South Sixth Street
Las Vegas, NV 89101

Counsel of Record for Petitioner

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARBARA L. STEINER,	)	
	)	
Plaintiff-Appellant,	)	No. 92-16882
	)	
	)	D.C. No.
v.	)	CV-90-00816
	)	-LDG(L)
	)	
SHOWBOAT OPERATING COMPANY, d/b/a Showboat Hotel & Casino,	)	ORDER DENYING PETITION FOR REHEARING AND REMANDING
	)	
Defendant-Appellee.	)	EMERGENCY MOTION FOR PERMISSION TO TAKE VIDEO DEPOSITION

Before: FLETCHER, KOZINSKI and TROTT, Circuit Judges

Appellee's petition for rehearing is denied except that "December 29, 1989" is corrected to "December 19, 1988" wherever it appears, to wit, at Slip op. 6218 and 6221 (in text and at footnote 4).

This case was dismissed on summary judgment. The issue of remedies was not

before the district court nor is it now before our court. Repayment of lost wages for lost work and use of sick leave where sexual harassment causes employee to take time off are examples of equitable remedies available under the pre-1991 Civil Rights Act. See Yates v. AVCO Corp., 819 F.2d 630, 638 (6th Cir. 1987) (Title VII equitable relief held to include repayment for lost work and use of sick leave where employer's sexual harassment caused employee to take time off); Walker v. Ford Motor Co., 684 F.2d 1355, 1364 (11th Cir. 1982) (Title VII's "ban on compensatory damages does not include concomitants of employment such as . . . lost work benefits); Dual v. Griffin, 446 F. Supp. 791 (D.D.C. 1977) (lost work due to racial discrimination). The existence of losses and available

remedies may be addressed on remand.

Appellant's motion for leave to take a video deposition is referred to the district court with the request that it be acted upon immediately. The Clerk is directed to transmit it forthwith to the district court along with this order.

In light of appellant's medical condition, the mandate shall issue forthwith.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

JUL 21 1994

by: [signed]
Deputy Clerk

Barbara L. STEINER, Plaintiff-Appellant,

v.

SHOWBOAT OPERATING COMPANY, d/b/a Showboat Hotel & Casino, Defendant-Appellee.

No. 92-16882.

United States Court of Appeals, Ninth Circuit.

Appeal from the United States District Court for the District of Nevada Lloyd D. George, District Judge, Presiding

Submitted Feb. 11, 1994.*
San Francisco, California

Filed June 10, 1994.

Before: Betty B. Fletcher, Alex Kozinski and Stephen S. Trott, Circuit Judges.

Opinion by Judge Fletcher

COUNSEL

Richard Segerblom, Las Vegas, Nevada, for plaintiff-appellant.

*The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P.34(a); 9th Cir.R.34-4.

Malani L. Kotchka, Smith & Kotchka, Las Vegas, Nevada, for defendant-appellee.

OPINION

FLETCHER, Circuit Judge:

Barbara Steiner appeals the district court's grant of summary judgment in favor of defendant-appellee Showboat Operating Company ("Showboat"), her former employer. Steiner's complaint alleged sexual harassment and retaliation in violation of 42 U.S.C. § 2000e *et seq.* ("Title VII"), constructive discharge, and intentional infliction of emotional distress. We have jurisdiction under 28 U.S.C. § 1291. We reverse the district court's grant of summary judgment for Showboat on Steiner's sexual harassment and intentional infliction of emotional distress claims, affirm on all other issues, and remand for further

proceedings.

FACTS

Showboat hired Steiner to work as a Blackjack dealer at Showboat Hotel and Casino in March of 1986. Two months later she was promoted to be the casino's first female "floorperson." Her supervisor was Jack Trenkle, a Showboat vice-president.

In 1987, Steiner complained to Showboat management that Trenkle was calling her offensive names based on her gender, such as "dumb fucking broad," "cunt," and "fucking cunt."[1] Trenkle was not reprimanded; rather, Steiner was

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[1]Showboat contends that these events fall outside the statutory limitations periods of 42 U.S.C. § 2000e-5(e) and NRS § 11.190(4)(e). Steiner argues they are admissible under Fed.R.Evid. 404(b). The district court has not ruled on their admissibility, and is not required to do so prior to summary judgment. Since, at the summary judgment stage, we view matters in the light most favorable to the non-moving party, we consider Trenkle's 1987 comments here.

moved to a different shift so that she would not have to be in contact with him. After about one month, however, she decided the new shift was too inconvenient and moved back to her old shift.

On December 19, 1988, Trenkle learned that Steiner had "comped" a breakfast for two men who had been playing Blackjack at her table. He confronted Steiner in front of customers and other employees, expressing his disapproval of her decision in the following words:

> You are not a fucking floor man [her job]. You are a fucking casino host. You comp every fucking fleabag that walks through the door.

She claims he moved toward her in a

threatening manner during this tirade. By his own admission, he then yelled,

> Why don't you go in the restaurant and suck their dicks while you are at it if you want to comp them so bad?

She claims he repeated this two or three times, laughed, and walked off with a grin on his face. Her version is corroborated by the deposition of a cocktail waitress who overheard the exchange.

Steiner complained to Showboat's manager the next day, and Trenkle was told to apologize. He did, although Steiner claims it was in a rude and sarcastic manner. Unsatisfied with this response, Steiner filed a complaint with the Nevada Equal Rights Commission (NERC). Once aware of her complaint,

Showboat conducted a more serious investigation, in which numerous Showboat employees were questioned about Trenkle's treatment of Steiner and of women generally. Their statements establish that Trenkle was abusive to men and women alike; however, his abusive treatment and remarks to women were of a sexual or gender-specific nature.

As a result of its investigation, Showboat sent a written reprimand to Trenkle for "sexually harassing" Steiner. Trenkle was told that if he ever again used sexual or derogatory language to or about any employee, he would be fired. Trenkle's shift was changed so that he and Steiner would no longer be at work during the same hours.

Steiner claims that Trenkle continued to harass her by showing up for

work early, as she was finishing her shift, and making "stares, glares, snickers, and comments." She complained to management, who said security police were watching Trenkle on casino video cameras, but had not yet seen anything incriminating. Management also asked her to transfer to the day shift, so that there would be no chance of meeting with Trenkle. She declined. A few days later, however, she was moved to day shift against her wishes, because "day shift is less demanding and will give you time to perform your job competently and with less stress," so that she could learn to supervise some different games (she could only supervise blackjack), and so that she would not have to be around Trenkle. Letter from G.C. Taylor, Jr. to Barbara Steiner (July 17, 1989).

Steiner said in a conference at NERC that she liked the day shift and was comfortable and less stressed there; however, she asked to be transferred back to her old shift. In September, 1989, Showboat complied with this request, transferring her to swing shift under the supervision of Dean Flurry, who had recently been hired as part of a new management team.

In November, Trenkle was fired because he broke the terms of his disciplinary letter. Specifically, he denied a female employee's request to leave early by saying "I wouldn't want you to lose your job either because you have got big boobs. I'd hate to terminate someone with big boobs." Trenkle Deposition of June 26, 1991, at 12.

In December, the new management team gave all employees evaluations. Steiner received three "Below Standard" marks out of seven categories, primarily because of her alleged inability to supervise any game except blackjack. At least two male supervisors got worse marks than Steiner on their evaluations. Steiner protested her evaluation to Showboat, saying she perceived it to be the first step toward terminating her.

Finally, Steiner claims she was "set up" by her new supervisor, Dean Flurry, in January, 1990. She claims he ordered her to supervise a complicated game of roulette, which he knew she was incapable of doing. When she was unable to properly calculate the payoffs, Flurry publicly ridiculed her. Soon after this, Steiner quit her job at Showboat. She

was replaced by a younger woman, Connie Knight.

Steiner then brought suit in district court, claiming sexual harassment and retaliation under Title VII, as well as constructive discharge and intentional infliction of emotional distress. The district court granted summary judgment in favor of Showboat on all claims.

DISCUSSION

I. *Sexual Harassment*

Steiner's claim relies upon the "hostile or offensive work environment" theory of liability for sexual harassment. *See Harris v. Forklift Systems, Inc.*, ___ U.S. ___, ___, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-66, 106 S.Ct. 2399, 2404-

2405, 91 L.Ed.2d 49 (1986). In order to survive Showboat's summary judgment motion, Steiner must show that there are genuine factual disputes as to (1) whether a reasonable woman would find that Trenkle's conduct was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment," and (2) whether Showboat, once apprised of Trenkle's behavior, failed to take adequate remedial and disciplinary action. *Ellison v. Brady*, 924 F.2d 872, 879, 881-83 (9th Cir.1991).

The Supreme Court has recently reconfirmed its "middle path" approach in such cases: while coworkers' occasional annoying or "merely offensive" comments do not constitute sexual harassment, "Title VII comes into play before the

harassing conduct leads to a nervous breakdown." *Harris*, ___ U.S. at ___, 114 S.Ct. at 370. Sexual or gender-based conduct which is abusive, humiliating, or threatening violates Title VII even if it does not cause diagnosed psychological injury to the victim. *Id.* at ___, 114 S.Ct. at 371. It is enough, rather, if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position.

Steiner has established without contradiction that Trenkle habitually referred to her and to other female employees in a derogatory fashion using sexually explicit and offensive terms. Indeed, in describing the episode in which he was fired for stating he would

"hate to terminate someone with big boobs," he said "I spoke the same way ever since I have been born, I think." Trenkle Deposition at 13.[2] Moreover, Trenkle's ongoing comments and conduct, and particularly those made to Steiner on December 18, 1988, were sexually explicit, offensive, highly derogatory, and publicly made. *See Harris*, ___ U.S. at ___, 114 S.Ct. at 371 (while a "mere offensive utterance" might not create a hostile environment, conduct which is "humiliating" is more likely to do so).[3]

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[2]Trenkle's lack of self-control is evident in that he made the "big boobs" comment *after* he had been officially reprimanded for his conduct with regard to Steiner, and had been threatened with termination if he engaged in further acts of sexual harassment.

[3]The defendant in *Harris* made a comment strikingly similar to Trenkle's: "[w]hile Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "What did you do, promise the guy ... some [sex] Saturday night?'" *Harris*, ___ U.S. at ___, 114 S.Ct. at 369 (alteration in original).

Steiner has made her case,[4] unless Showboat can demonstrate that it took adequate remedial and disciplinary action.

Showboat attempts to meet Steiner's sexual harassment claim, with a two-pronged defense. First, Showboat claims that Trenkle harassed everyone, male and female alike, and therefore his harassment of Steiner was not based on her gender. Appellee's Brief at 18-20. Second, Showboat argues that Steiner could handle--and in fact "welcomed"--Trenkle's abuse, since she herself was

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[4]We note that Steiner's claim involves both a specific, severe instance of harassment, on December 29, 1989, and allegations of ongoing, sexually derogatory behavior. Because we consider both the severity and the pervasiveness of sexually hostile conduct, we have weighed Steiner's allegations together. *See Ellison*, 924 F.2d at 878 ("the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct") (citation omitted).

"legendary for talking like a 'drunken sailor.'" *Id.* at 4, 20-21. The district court's disposition relies on the former defense. Order of Sept. 23, 1993, at 13-14. Both defenses, however, rely on a misstatement of the undisputed facts and a misunderstanding of the law.

The district court erred in endorsing Showboat's argument that Trenkle's conduct was not sexual harassment because he consistently abused men and women alike. In the first place, that argument mischaracterizes his actual behavior. The numerous depositions of Showboat employees reveal that Trenkle was indeed abusive to men, but that his abuse of women was different. It relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct. *See Harris*, ___ U.S. at ___,

114 S.Ct. at 369 (defendant called plaintiff a "dumb ass woman," said "you're a woman, what do you know," suggested "negotiating" her raise at the local Holiday Inn, and "jokingly" asked whether she had had sex with clients). While Trenkle may have referred to men as "assholes," he referred to women as "dumb fucking broads" and "fucking cunts," and when angry at Steiner, suggested that she have sex with customers. And while his abuse of men in no way related to their gender, his abuse of female employees, especially Steiner, centered on the fact that they were females. It is one thing to call a woman "worthless," and another to call her a "worthless broad."

Furthermore, even if Trenkle used sexual epithets equal in intensity and in an equally degrading manner against male

employees, he cannot thereby "cure" his conduct toward women. *Ellison* unequivocally directs us to consider what is offensive and hostile to a reasonable *woman*. *Ellison*, 924 F.2d at 878 ("conduct that many men consider unobjectionable may offend many women"). And finally, although words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that *both* men and women working at Showboat have viable claims against Trenkle for sexual harassment.

The district court's misunderstanding is also revealed by its perception that Steiner's claim is somehow defeated by the fact that Trenkle referred to Asians as "UFO's--ugly fucking orientals." Order of Sept. 23, 1993, at 14. Again, such insulting

language differs fundamentally different from terms like "jerk" or "asshole;" it is a race-based insult which, like Trenkle's gender-based comments, might well violate Title VII if made to an Asian employee. The fact that Trenkle may have uttered racially discriminatory slurs only suggests that he was just as insensitive in matters of race as in those of gender. It in no way excuses his conduct toward Steiner.[5]

There is no doubt that Steiner was sexually harassed. The only question is whether Showboat is relieved of liability for Trenkle's actions because it took

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[5]We also reject Showboat's assertion that Steiner somehow "welcomed" Trenkle's harassment because she herself talked like a "drunken sailor," since there is no suggestion in the record that Trenkle's remarks were in fact welcomed. We do not rule out, of course, the possibility that an employee who regularly subjects her co-workers to sexually abusive language effectively might invite them to respond in kind.

sufficient disciplinary and remedial action in response to Steiner's complaints. *See Intlekofer v. Turnage*, 973 F.2d 773, 779-80 (9th Cir. 1992); *Ellison*, 924 F.2d at 881-82. The evidence suggests that Showboat was consistently slow to react to Steiner's claims, and did not seriously investigate them or strongly reprimand Trenkle until after Steiner had filed her complaint with the NERC. Moreover, Showboat twice changed *Steiner's* shift to get her away from Trenkle, rather than changing his shift or work area within the casino or, indeed, firing him outright and early on. *See Intlekofer*, 973 F.2d at 780 n.9 (a victim of sexual harassment should not have to work in a less desirable location as a result of the employer's remedial plan); *Ellison*, 924 F.2d at 882 (same).

Although Showboat finally fired Trenkle, it was for his comments to a different woman, and it was done only after Steiner and the NERC had convinced Showboat that Trenkle's behavior could become a serious legal liability for the casino.

We reverse the district court's grant of summary judgment in Showboat's favor, and remand for further proceedings. Unless Steiner's evidence is cast into substantial doubt by Showboat's opposition, it would seem that on remand Steiner herself may be entitled to summary judgment on her claim of sexual harassment.

II. *Retaliation*

Steiner also claims Showboat acted in violation of 42 U.S.C. § 2000e-3(a) (1982) by retaliating against her for

complaining about Trenkle and for filing two complaints with the NERC. To make out a prima facie case she must establish that she acted to protect her Title VII rights, that an adverse employment action was thereafter taken against her, and that a causal link exists between these two events. *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir.1988), *cert. denied*, 488 U.S. 1006, 109 S.Ct. 786, 102 L.Ed.2d 778 (1989). The burden of production then shifts to Showboat to advance legitimate, non-retaliatory reasons for any adverse actions taken against Steiner; she has the ultimate burden of showing that Showboat's proferred reasons are pretextual. *Id.; Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 730-31 (9th Cir.1986) (order and allocation of proof for retaliation claims follows

familiar scheme announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). Steiner alleges three acts of retaliation, none of which ultimately passes muster.

Steiner first points to her transfer to day shift from swing shift, as a result of her letter to management stating that Trenkle was still harassing her. While this action was an instance of insufficient *remediation, see Ellison*, 924 F.2d at 882, it was not retaliatory in nature.[6] The record shows clearly that Showboat was trying to avoid trouble between Steiner and Trenkle. Because

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[6]We note in addition that the transfer is just barely--if at all--characterizable as "adverse" employment action: Steiner was not demoted, or put in a worse job, or given any additional responsibilities. In fact, at first she even claimed to enjoy the day shift.

Steiner has presented no evidence to rebut Showboat's evidence that the transfer was not retaliatory, Steiner's claim cannot survive summary judgment on this basis.

Steiner next claims that her three low marks on Showboat's employee evaluation were an act of retaliation by Showboat. The evaluations were the idea of Showboat's new management team, and had not previously been performed. Again, while Steiner has made out a prima facie case, she has presented no evidence at all to rebut Showboat's strong showing of a non-retaliatory reason. Steiner's low marks were based on Showboat's contention that she needed to learn to supervise games other than blackjack; Showboat had sent Steiner a letter to this effect earlier in the year. Letter

from G.C. Taylor, Jr. to Barbara Steiner (July 17, 1989). Moreover, Showboat claims the evaluations were not going to be used to fire anybody, and there is no indication in the record that they were used as the basis for any adverse actions against Steiner. Finally, at least two male dealers received worse marks than Steiner.

Steiner also relies on the alleged episode in which her new supervisor, Dean Flurry, ridiculed her by making her supervise a game of roulette although he was fully aware she could not competently do so. She alleges no plausible, concrete connection between this incident and her complaints about Trenkle. Flurry was the supervisor who gave her low marks because she didn't know how to supervise roulette; this incident, if true, is more

likely to have been his way of driving home her need to hone her job skills than an act of retaliation by *Showboat* against her for her complaints about Trenkle.[7]

Steiner has failed to present triable issues of fact sufficient to support her retaliation claim. We therefore affirm the district court's grant of summary judgment in Showboat's favor on the retaliation claim.

III. *Constructive Discharge*

To survive Showboat's motion for summary judgment on this claim, Steiner must show that there are triable issues of fact as to whether "a reasonable

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[7]Flurry, part of the new management team, had worked for Showboat a very short time when Trenkle was fired. There is thus little reason to suspect--and no evidence to show--that he had a connection to Trenkle which would lead him to retaliate against Steiner on Trenkle's behalf.

person in [her] position would have felt that [she] was forced to quit because of intolerable and discriminatory working conditions." *Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir.1989); *Jordan*, 847 F.2d at 1377; *see generally* Note, "Constructive Discharge under Title VII and the ADEA," 53 *U.Chi.L.Rev.* 561 (1986).

Several facts militate against Steiner's claim. First, Trenkle was fired two and one-half months prior to her resignation. *Cf. Brady v. Elixir Industries*, 196 Cal.App.3d 1299, 242 Cal.Rptr. 324, 328 (Cal.App. 4 Dist. 1987) (in order to constitute constructive discharge, harassment must be intolerable "*at the time of the employee's resignation*") (emphasis added). Second, for several months prior

to her resignation she had been restored at her request to her favored shift: the swing shift. Third, she has failed to establish any retaliatory conduct by Showboat's management or employees. Taken together, these facts suggest that Steiner had effectively petitioned Showboat management and the NERC for relief from Trenkle's harassment, in the sense that his sexual harassment had been halted some time before she quit.

Steiner claims that the low marks on her employee evaluation, and the alleged roulette wheel incident with Flurry, indicate that Showboat was laying the groundwork for her termination, or was attempting to force her to quit. But Steiner has established neither that her evaluation was discriminatory or retaliatory, nor that it constitutes the

kind of "intolerable" act that would force an employee to resign. *See Thomas*, 877 F.2d at 1434; *compare with Sanchez v. City of Santa Ana*, 915 F.2d 424, 431 (9th Cir.1990) (constructive discharge occurred where unfounded negative evaluations led to denial of merit pay on two separate occasions, and where employee's attempts to challenge loss of pay were rebuffed). Indeed, the evaluation as a whole characterized her as an "acceptable" employee. Similarly, Steiner has not established an issue of fact as to whether Flurry's alleged actions were discriminatory or retaliatory in nature; at worst, they would constitute a harsh way of driving home his criticism of her job skills.

While we dismiss this claim, we do not mean to suggest that the fact Steiner

quit her job may not weigh in to her proof (1) of damages for sexual harassment and (2) of the extent of her distress and other damages for the intentional infliction of emotional distress claim. Steiner began her career at Showboat as a promising employee, the Casino's first female floorperson; it ended, sadly, in defeat. Steiner's personal notes make it clear she was in considerable emotional turmoil at the time she resigned from her job with Showboat. Her treatment by Trenkle in all likelihood poisoned her relationship with Showboat management, and may have persuaded her that it was out to get her. The fact that she quit may be evidence of the emotional turmoil and instability caused by Trenkle's conduct.

IV. *Intentional Infliction of Emotional Distress*

Steiner claims that Showboat is liable for Trenkle's intentional infliction of emotional distress upon her. To succeed on this claim, she must show that Trenkle engaged in "extreme and outrageous" conduct, intending to cause emotional distress or recklessly unaware of that possibility, and in fact caused severe or extreme emotional distress. *Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588, 591 (9th Cir.1992) (citing *Branda v. Sanford*, 97 Nev. 643, 637 P.2d 1223, 1227 (1981)); *Nelson v. Las Vegas*, 99 Nev. 548, 665 P.2d 1141, 1145 (1983); *see* Restatement of Torts (Second) § 46, at 73 (defendant's conduct must "go beyond all possible bounds of decency" and be "atrocious, and utterly

intolerable in a civilized community"). In addition, she must show that Showboat is liable for Trenkle's acts under the principles of respondeat superior. *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370, 1375 (9th Cir.1990).

We have previously noted, in this context, that an employer owes his or her employees a greater degree of respect because of the employment relationship. *Dias*, 919 F.2d at 1374 (discussing Oregon law); Restatement (Second) § 46, comment (e). Moreover, while simple insults do not constitute intentional infliction of emotional distress, insults which include sexual or racial harassment may rise to that level. *Dias*, 919 F.2d at 1375; *Alcorn v. Anbro Engineering, Inc.*, 2 Cal.3d 493, 86 Cal.Rptr. 88, 468 P.2d 216, 217 (1970). Finally, where there is

public humiliation it is much more likely that the tort action will lie. *Sanchez-Corea v. Bank of America*, 38 Cal.3d 892, 215 Cal.Rptr. 679, 691, 701 P.2d 826, 838 (1985).

In *Dias*, we upheld a jury verdict awarding a female plaintiff $625,000 for defendant Sky Chef's intentional infliction of emotional distress. Defendant's manager, who was plaintiff's supervisor, had engaged in a course of sexual harassment of plaintiff and other female employees; when she complained, he sabotaged her work and ultimately had her fired. 919 F.2d at 1373. In light of these precedents, we are unprepared to hold as a matter of law that public humiliation of an employee by her employer, accomplished through rude, crude sexually explicit remarks and

actions, cannot constitute intentional infliction of emotional distress. In fact it appears that only the degree of distress is at issue.[8] Since Steiner has raised triable issues of fact as to each of the aggravating factors discussed above, we hold that the district court erred in granting Showboat's motion for summary judgment.

AFFIRMED, in part, REVERSED, in part, and REMANDED.

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[8]Here, unlike in the Title VII context, the victim's actual, psychological harm is an essential element of the claim.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BARBARA L. STEINER, Plaintiff, vs. SHOWBOAT OPERATING COMPANY, d/b/a SHOWBOAT HOTEL & CASINO, Defendant.	CV-S-90-816-LDG (LRL)

ORDER

This matter is before the court on Defendant's Motion to Strike Jury Demand (#27), Motion for Summary Judgment (#33), and Motion to Strike Paragraph 11 of Affidavit of Richard Segerblom and Exhibit 10 to Opposition (#39).

I. Background

This employment discrimination action arises from incidents occurring

between the plaintiff, Barbara Steiner, and her supervisors at Steiner's former place of employment, the Showboat Hotel and Casino in Las Vegas, Nevada. Steiner became employed at the Showboat on March 1, 1986. She started as a "21" dealer and two months later became a floorperson. Jack Trenkle was employed at the Showboat for 31 years and at the time of the incidents in question held the position of Vice President/Assistant Casino Manager and was Steiner's supervisor on the swing shift at the casino.

On December 29, 1988, Steiner, upon questioning by Trenkle, indicated that she had "comped" two men who had been playing "21." According to Steiner, Trenkle became angry and said: "Bradley in poker told me they came to him for a

comp and he said no, and they said, 'we can go to that dumb broad in 21, and she will comp us.'" He allegedly screamed, "That's you, Steiner." Steiner told Trenkle that she had a right to comp them since they "bought in" for $100.00, played for half an hour, and lost. Trenkle then allegedly said, "You are not a fucking floor man. You are a fucking casino host. You comp every fucking fleabag that walks through the door." Steiner denied that she comped players any more than anybody else did. Trenkle walked away, but then came back and said, "Why don't you go in the restaurant and suck their dicks while you are at it if you want to comp them so bad." Although Steiner described Trenkle as being "very angry" throughout the incident, screaming and red in the face, she stated that he

made the statement several times and after he made it, he laughed. Trenkle testified that he made the statement to Steiner after he heard her say "I'll be goddamned" and "Rosie can tell people to go get fucked and I take somebody into the restaurant to eat and I get my as[s] ate out." He indicated that he was very angry at the time, that he made the statement only once, and that he did not laugh when he said it.

On the next day, December 30, 1988, Steiner complained to Showboat Executive Vice President Cliff Taylor and Vice President/Casino Manager Peter Amante about the incident. Taylor told Steiner he was sorry the incident had happened and that the Showboat did not condone that type of behavior. Both he and Amante assured Steiner that they would

take care of the situation. Later that day, Amante questioned Trenkle about what had occurred. Trenkle admitted that he told Steiner "to go and suck the customers' dicks." Amante told Trenkle to apologize to Steiner and leave her alone or he would be fired. Trenkle apologized to Steiner that afternoon. According to Steiner he said, "I was told to apologize. I apologize. I will never talk to you that way again." According to Trenkle, Steiner said, "Okay, thank you very much." Apparently Trenkle never did speak to Steiner again.

Steiner told Pete Amante that Trenkle had apologized. She states that she told him the apology was rude and sarcastic, but that Mr. Amante said nothing in response. Pete Amante asserts that Steiner told him only that Trenkle

had apologized, nothing more. Thus, as far as he and Cliff Taylor knew, the situation had been resolved.

On March 2, 1989, over two months later, Steiner filed a charge with the Nevada Equal Rights Commission ("NERC") alleging that she had been sexually harassed by Trenkle on December 29, 1988. Steiner admits that prior to filing the charge, she did not indicate to anyone at the Showboat that the apology from Trenkle was an insufficient remedy. When she filed this original charge, Steiner requested as a remedy that Trenkle stop harassing her, that her work environment be free from hostility, that Trenkle be disciplined according to company policy[1]

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[1]The Showboat's harassment policy reads in part:

Specifically forbidden is harassment of a sexual, racial, ethnic, or religious nature.

and that the Showboat not retaliate against her.

The Showboat investigated Steiner's charge by speaking individually to all swing shift dealers and floorpersons, including Steiner. As a result of the investigation, on April 21, 1989, the Showboat issued to Trenkle the following disciplinary reprimand:

> In accordance with company policy, Jack, you are being reprimanded for sexually harassing Barbara Steiner. If you ever use derogatory sexual, obscene or offensive language

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Such harassment includes unsolicited remarks, gestures or physical contact; display or circulation of written material or pictures derogatory to either gender or to racial, ethnic or religious groups or basing personnel decisions on an employee's response to sexually oriented requests. . . .

Employees who have engaged in harassing conduct are subject to appropriate disciplinary action, up to and including discharge.

to or about any employee again, you will be terminated.

You must stay away from and not talk to Barbara Steiner. Your shift will be changed. Your days off may be changed. You will not receive your quarterly bonus for the first quarter of 1989.

On April 20, 1989, the Showboat issued a memo to all employees reminding them that it continued to enforce its no-harassment policy and on October 5, 1989, held a seminar on sexual harassment which Steiner did not attend. Trenkle's shift was in fact changed from swing shift to relief and ultimately to graveyard shift.

On July 11, 1989, Steiner reported to her supervisor, Junior Goss, that John

Snow, a dealer and her subordinate, had violated company rules. Goss told her she could give Snow a written warning notice. When Steiner asked Snow to sign the warning, he refused and yelled at her. Steiner asked Goss, who was present during the exchange to do something, but Goss stood by and said nothing. Steiner then told Snow to "get the fuck out of the pit" and Snow eventually left.

The following day, Steiner complained about this occurrence to Walt Reid, Showboat's Director of Human Resources. Reid immediately contacted Jim Lewis, the new Vice President of Casino Operations, who immediately suspended Snow so that Steiner would not have to work with him. Walt Reid attempted to call Steiner that evening to let her know that Snow was suspended, but

could not contact her. Lewis also scheduled separate meetings with Snow, Goss and Steiner for the next day, July 13, 1989. Steiner sent a letter to Cliff Taylor calling his attention to the occurrence with Snow and Goss. In the letter, she also alleged that even though her work hours on swing shift did not coincide with Jack Trenkle's on graveyard shift, Trenkle had been showing up for work early and harassing her "through stares, glares, snickers and comments."

Jim Lewis, who had also received a copy of the letter, and Jackie Gerlock, then-Human Resources Coordinator for the Showboat, met with Steiner the next day. He told her that he did not want her to get sick, that he was concerned about her health and that it was not good for her to get upset. He stated that he could

not run the pit around one person and offered to transfer her from the swing shift to the day shift to resolve her complaints. Steiner indicated she did not wish to be transferred because swing was her usual shift and a transfer would disrupt her life. Lewis also said that Trenkle was being watched by Showboat security to see if he was glaring or staring at Steiner, but that so far they had seen nothing.

On July 13, 1989, Jim Lewis and Jackie Gerlock also met with Junior Goss and John Snow. Goss was informed that he had to take immediate action when an employee yells at a supervisor and that the situation between Snow and Steiner had gotten out of hand. John Snow was told not to argue with Steiner when she issued discipline to him and was given a

three-day disciplinary suspension for insubordination.

Cliff Taylor informed Steiner of these actions in a letter dated July 17, 1989, sent in response to her letter of July 12. He also stated that since her complaint about Trenkle, management had had Security observe Trenkle, but had not found any verification that he had stared, glared, or snickered at Steiner. Taylor indicated that Trenkle had assured him that he had not engaged in such conduct or made any comments to others and that before the Showboat could take any further disciplinary action against Trenkle, Taylor would need verification of Trenkle's alleged conduct. Taylor requested that Steiner bring him any verification she had, but ultimately Steiner never provided any.

The letter also informed Steiner that she was being moved to day shift, although she had indicated that she did not wish to move from swing shift, because (1) day shift was less demanding and would allow her to perform her job more competently and with less stress, (2) the Showboat wanted all of its floorpeople to be able to protect the three games of 21, craps and roulette, and day shift would give her the opportunity to learn roulette and craps so she could protect those games,[2] and (3) she would not have to work with, for or around John Snow or Jack Trenkle. The letter stated that Jim Lewis would see that Steiner got all the supervisory support she needed and that the Showboat

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[2]Steiner admits that she did not know how to protect roulette, craps, or pai gow poker.

was doing its best to reduce the aggravation and stress she felt.

After Steiner was transferred to day shift on July 26, 1989, she told Jim Lewis she really liked the day shift and was stress-free; she was glad to be working with Bernie Di Paolo, her day shift supervisor; she had no respect for either Goss or Trenkle; and the day shift was working out for her at home as well. While on day shift, Steiner received training on mini baccarat and learned the game of pai gow poker.

Effective August 1, 1989, Steiner received a 10% salary increase. At an NERC fact-finding conference in August 1989, Steiner said she was stress-free because she was no longer working with Trenkle. She indicated that the day shift was working out for her at home and

stated, "I am treated on day shift with respect and the same as everyone else like the way I should have been treated the day I walked throughout the door." Nonetheless, although she did not allege in either of two NERC charges she filed that her transfer to day shift was retaliatory, she stated in her deposition that it was the only adverse employment action taken against her by the Showboat. Moreover, at the August 1989 fact finding conference, she requested that she be returned to swing shift as a remedy on her charge against Trenkle. In September 1989, after repeated requests from Steiner, the Showboat transferred her back to swing shift under the supervision of Dean Flurry, who had been hired in September of 1989 as part of new casino management at the Showboat.

Jack Trenkle resigned from the Showboat on November 16, 1989 and John Snow was discharged from the Showboat on November 26, 1989. In November 1989, Steiner told her counselor, Kristine Vandermark that her humor was returning and that she was able to stand up for herself.

In December 1989, the new casino management gave employee performance evaluations. On December 5, 1989, Dean Flurry evaluated Steiner as "below standard, needs improvement" in three of seven areas evaluated: quality of work, quantity of work, and initiative.[3] Flurry explained to Steiner both orally and in writing that she received the

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[3]Steiner was not the only floorperson to receive a "below standard" evaluation. Male floorpersons Juan Flores and Robin Dickey received below standard ratings in four and three areas, respectively.

rating because she only knew how to protect the game of 21. Flurry indicated she should learn more games, improve her knowledge of 21, and learn to count cards because she needed to be able to identify card counters. Prior to her evaluation, Charlie Howell had explained how to do a plus/minus count and had suggested she read books to help her learn how to count cards, but she never did.

By letter dated December 6, 1989, Steiner indicated to Lewis that she did not believe she should have been rated negatively when she had not been required to learn games other than 21 or to keep a plus/minus count. The letter stated that if she was not given the opportunity to learn these skills, she would assume this was the first step towards her termination. Approximately one week

later, Jim Lewis met with Steiner and told her that the evaluations were done to make the casino more efficient and profitable, that her appraisal was meant to be constructive criticism and that no one was going to be fired because of the performance evaluations. He stated that the Showboat just wanted her to learn roulette and pai gow poker and they were not trying to "force her out" or replace her with Connie Knight, another dealer and relief floorperson at the casino.

Jim Lewis also responded to Steiner's letter by a letter dated December 13, 1989. In the letter he explained that the appraisal measured the performance of the job being done and reminded Steiner that she was placed on day shift in July of 1989, in part so that she could learn to protect roulette

and craps because the Showboat wanted all of its floorpeople to be able to protect those games, as well as 21. He explained that a plus/minus count was a part of the floor supervisor's job and that Steiner had never taken the initiative to ask for training even though these deficiencies had been brought to her attention over five months previously in the letter from Cliff Taylor.

Kristine Vandermark's notes from her meeting with Steiner on December 19, 1989 reflect that Steiner had indicated she was "doing well, anxiety much improved, eating and sleeping better."

In January 1990, Steiner began telling casino employees that she was going to quit. She originally planned to stay until March 1, 1990, her vacation anniversary date, because she thought she

had to do so in order to get her vacation. She left earlier, on February 1, 1990, upon learning that her vacation pay would be prorated. Steiner told Dean Flurry that she would not quit until she had another job. Steiner signed a voluntary resignation and, on her application for her profit sharing plan distribution, wrote, "I quit!"

II. Discussion

A. Title VII Liability for Sexual Harassment

Title VII makes it unlawful for an employer to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of that individual's sex. 42 U.S.C. §2000e-2(a)(1). In Meritor Sav. Bank, FSB v. Vinson, 477

U.S. 57, 106 S. Ct. 2399 (1986), the Supreme Court recognized that sexual harassment may constitute unlawful sex-based discrimination in violation of Title VII if such harassment is sufficiently severe or pervasive to create a hostile or abusive work environment. Id. at 66, 106 S. Ct. 2405. Sexual harassment is a form of sex discrimination in which the prohibited conduct is sexual in nature, not just sex-based. EEOC Compliance Manual (CCH) §615.6(a) (1988). To establish such a "hostile environment" sexual harassment claim, a plaintiff must demonstrate that (1) he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was

sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment. Ellison v. Brady, 924 F.2d 872, 875-76 (9th Cir. 1991); Jordan v. Clark, 847 F.2d 1368, 1373 (9th Cir. 1988), cert. denied 488 U.S. 1006, 109 S. Ct. 786 (1989).

Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). To survive a motion for summary judgment, the non-moving party must set forth specific evidence to establish the existence of a genuine issue of material fact as to each essential element of her case with respect to which she has the burden of proof. Celotex Corp. v. Catrett, 477

U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). A complete failure of proof concerning an essential element of the nonmoving party's case entitles the moving party to judgment as a matter of law. Id. Thus, to survive summary judgment on her claim of sexual harassment under Title VII, Steiner must demonstrate material issues of fact as to all of the following: (1) that she was the subject of unwelcome sexual harassment, (2) that the sexual harassment was such that a reasonable woman would consider it so severe or pervasive as to alter the conditions of employment and create an abusive working environment, (3) that the alleged harassment was based on her sex, and (4) that the Showboat failed to take adequate remedial action. Because the court finds

that Steiner has failed to establish a prima facie case sufficient to raise a genuine issue for trial that the alleged sexual harassment was based on her sex, summary judgment must be granted in favor of the Defendant on Steiner's Title VII claim.[4]

It is undisputed that Jack Trenkle never made a sexual advance towards Barbara Steiner, nor did he ever request a sexual favor from her. Steiner alleges that Trenkle referred to female employees as "pig pen," "fish market," and "fucking

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[4]Because the court has determined that there is no genuine issue of fact as to whether Steiner was subjected to discrimination based on sex, the court need not, and does not reach the question of whether she has set forth specific facts to demonstrate genuine issues for trial on whether the incident in question represents unwelcome conduct of a sexual nature which was so severe or pervasive as to create an abusive working environment or whether the Showboat took adequate remedial action.

cunts," but she has provided no evidence that these comments were ever directed specifically at her or made in her presence. Nor is there any evidence that Trenkle called Steiner the "Beast of Baston" to her face. One person, Joseph Germano, said he had seen Trenkle make "obscene" gestures toward Steiner, but he does not indicate what those gestures were, nor does Steiner assert that she was aware of or affected by those gestures. One person, Sandra Pigg-Kemper saw Trenkle bump into Steiner once and Walter Teutonico saw Trenkle bump into her once or twice. However, Steiner never complained to the NERC or EEOC about Trenkle bumping into her, thus that action, if it occurred, cannot be the basis for this Title VII action. Moreover, Steiner does not provide any

evidence to support a conclusion that that "bumping" in some way rose to the level of sexual harassment. The sole basis of Steiner's claim of sexual harassment is the incident and exchange that took place between herself and Jack Trenkle on December 29, 1988. To be the basis of an actionable sexual harassment claim under Title VII, that incident must constitute unwelcome verbal conduct of a sexual nature which had the effect of unreasonably interfering with Steiner's employment, and it must also have been based upon Steiner's sex.

The essence of a sexual harassment claim under Title VII is that an employee is intentionally singled out for adverse treatment on the basis of certain prohibited criteria; in this case the criterion is sex. To establish sex-based

discrimination, Steiner must demonstrate that, but for the fact of her sex, she would not have been the object of harassment. If the comments or conduct underlying an alleged sexual harassment claim are not linked in any way to the recipient's sex, there has been no disparate treatment under Title VII. Thus, to prove a sexual harassment claim based on a hostile work environment, Steiner must show that she was treated differently than similarly situated male employees at the Showboat. Steiner has made no such showing.

Although Steiner points to other occasions on which Trenkle used vulgar language to her and to two other women at the Showboat, the undisputed evidence shows that Jack Trenkle called males as well as females by derogatory names, used

vulgar language with both sexes, and often treated them both in a similarly deprecating manner. Walter Teutonico said Trenkle yelled at him once for three hours. Joseph Germano heard Trenkle call individuals by derogatory names before women ever came to the Showboat. Trenkle called dealer Robert McGrath a "stupid asshole" everyday. Both male and female employees indicated that Trenkle made derogatory remarks and used vulgar language with both men and women. McGrath and Crayton Murray both indicated that when dealers were losing, Trenkle subjected them to derogatory remarks, regardless of their sex. Beth Andrews (formerly Semenko), a cocktail waitress at the Showboat testified that Trenkle always used vulgar language and used such language "with everyone." She also

testified that Trenkle would call persons of Asian descent "UFO's, ugly fucking orientals."

While Trenkle's comment may have referred to a sexual act, that does not make it sex discrimination. While not bound by its provision, the court may properly look to guidelines issued by the EEOC for guidance when examining "hostile environment" claims of sexual harassment. Ellison, 924 F.2d at 876; see Meritor Sav. Bank, 477 U.S. at 65, 106 S. Ct. at 2404-05. The EEOC Compliance Manual indicates that

> some forms of verbal conduct (such as specific words or some jokes) may involve sex or sexuality without discriminating on the basis of sex. That is, such conduct

> does not treat one sex either more or less favorably than the other sex. Without such disparate treatment, unwelcome verbal conduct of a sexual nature is not sex discrimination and, consequently, cannot be sexual harassment.

EEOC Compliance Manual (CCH) §615.6 (1988). In this case, Trenkle's remark to Steiner on December 29, 1988 referred to sex without discriminating on the basis of sex. Trenkle called numerous male employees by derogatory names and used vulgar language with both male and female employees. As Steiner has failed to prove that the alleged harassment was based on, or would not have occurred but for her sex, the Showboat is entitled to

judgment as a matter of law on Steiner's claim of sexual harassment under Title VII.

B. Retaliation and Constructive Discharge

After she resigned her employment at the Showboat, Steiner filed a second NERC charge alleging that she was subjected to retaliation under Title VII because, beginning in December 1989 and continuing to January 1990, she received a substandard evaluation and a change of assignments by Dean Flurry and Charlie Howell, and on January 28, 1990, she claims she was forced to quit her job.

It is unlawful for an employer to discriminate or retaliate against any employee because the employee has opposed any unlawful employment practice or because the employee has filed a charge

under Title VII. 42 U.S.C. §2000e-3(a) (1982). To succeed on a retaliation claim, a plaintiff must establish (1) that the plaintiff engaged in a protected activity, (2) that she was thereafter subjected by her employer to adverse employment action, and (3) that a causal link exists between the two. Jordan, 847 F.2d at 1376. As Steiner failed to demonstrate specific facts that would support the conclusion that the Showboat subjected her to adverse employment action in retaliation for her filing the initial charge with the NERC, summary judgment in favor of the defendant on the claim of retaliation is also appropriate.

In Jordan, the plaintiff alleged that the employer's actions amounted to a pattern of retaliatory harassment that caused her constructive discharge. Those

actions included submitting her promotion papers late, increasing her duties without amending her job description, denying her request to attend management courses, taking away higher level duties, giving her several poor performance appraisals and drawing up new performance standards for her position, allegedly as a means of reviewing later performances, directing her work to other employees and giving her a position limited to clerical work. The Ninth Circuit affirmed the district court's granting of the defendant's motion for summary judgment on the grounds that while some of these actions had occurred, they appeared to be the result of clashing personalities, and either did not have an adverse impact on the plaintiff and did not create an abusive environment that led to her

constructive discharge, or the employer had legitimate reasons for the adverse actions it did take. Id. at 1376-77.

At her deposition, Steiner stated that the only adverse employment action taken by the Showboat against her was changing her from swing shift to day shift in July 1989. However, the record shows that the Showboat, like the employer in Jordan, had legitimate reasons for changing Steiner's shift to days. Showboat management decided to change her shift to help relieve her job stress, to give her the opportunity to learn roulette and craps (as the Showboat wanted all of its floorpeople to be able to protect those games) and so she would not have to work with or around John Snow. Moreover, Steiner later admitted that the day shift was working out well

for her and that she was stress-free. On the evidence presented, the court finds that transferring Steiner to day shift was not an adverse action taken in retaliation for Steiner's filing of a sex discrimination complaint, in light of the fact that the Showboat has demonstrated other legitimate reasons for changing Steiner's shift and that Steiner suffered no adverse consequences as a result of the change.

The court further finds that the changing of Steiner's shift, combined with the Showboat's other actions in regard to Steiner, did not constitute a constructive discharge. "A constructive discharge occurs when, looking at the totality of the circumstances, a reasonable person in the employee's position would have felt that she was

forced to quit because of intolerable and discriminatory working conditions." Jordan, 847 F.2d at 1377 n.10 (internal quotations omitted). If shown, constructive discharge is an adverse employment action. Id. To establish that she was constructively discharged, a plaintiff must at least show some "aggravating factors," such as a continuous pattern of discriminatory treatment, so that a reasonable employee would have felt forced to resign. Thomas v. Douglas, 877 F.2d 1428, 1434 (9th Cir. 1989); Nolan v. Cleland, 686 F.2d 806, 813 (9th Cir. 1982). Although the determination of whether conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a question left to the trier of fact, if the plaintiff fails

to make the requisite prima facie showing, the district court may properly grant judgment for the defendant as a matter of law. See Thomas, 877 F.2d at 1434.

By the time Steiner quit her job at the Showboat, Trenkle had been gone for two and a half months. Steiner does not allege that, aside from Trenkle's remark in December of 1989, any Showboat manager ever used vulgar or offensive language in front of her again. As discussed supra, Trenkle did not treat Steiner or other female employees any different than he treated male employees. Similarly, other members of Showboat management did not treat Steiner any different than they treated other casino floorpeople. It is true that the Showboat was pushing Steiner to learn games other than 21, but

the new management at the casino was pushing all of its floorpeople, including Steiner's male coworkers, to learn all of the games. Nor was Steiner's receiving three "below standard" ratings discriminatory or retaliatory. Steiner admits that she did not know any game other than 21. She also admits that her supervisor, Dean Flurry, told her she could improve her performance by learning more games, improving her knowledge of 21 and learning to count cards. Jim Lewis, the Vice President of Casino Operations, told Steiner that no one would be fired over the performance evaluations and that they had been instituted by new management to provide constructive criticism to improve the efficiency and profitability of the casino. Steiner had been informed that management wanted her

to learn other games since at least July 1989, when she received the letter from Cliff Taylor informing her that she was being transferred to day shift in part to give her the opportunity to learn craps and 21 so that she could protect those games. The criticisms in Steiner's evaluation were legitimate and nondiscriminatory. Male floorpersons also received "below standard" ratings on their performance evaluations. Steiner told her counselor on December 19, 1989, after she received her performance evaluation, that her anxiety was improving and that her eating and sleeping were better. Steiner did not allege that she had been harassed or retaliated against by the Showboat at the time she told the Showboat she was leaving.

Steiner alleges for the first time in her Opposition to the Showboat's Motion for Summary Judgment that the "straw that broke the camel's back" occurred in early January 1990 when Dean Flurry ordered her to supervise a big roulette game. She never mentioned the roulette game in her March 29, 1990 NERC charge. She states that Dean Flurry yelled at her to "tell Frank what to pay." Steiner said she told Flurry she had no idea what to pay because obviously she was not qualified to watch such a game. She said that Flurry then "threw his hands in the air, stomped over, and told Frank what to pay." She asserts that Flurry and Murray "had a good laugh over it." However, Steiner does not assert that she heard Flurry and Murray talking and thus would have had no way of

knowing about what they were laughing. Moreover, Flurry's conduct was not so intolerable or aggravating that a reasonable person would have felt compelled to resign. Indeed, given that Steiner was told in July of 1989, and again in December of 1989, that management wanted her to learn roulette, and that by January of 1990 she could only watch, at most, a simple game, Flurry's frustration was understandable. Steiner was never disciplined or reprimanded for not knowing what to pay off on the game and no one at the casino ever asked her to quit.

Steiner also points to the comments of her counselor, Kristine Vandermark, in support of her argument that she was constructively discharged. Vandermark stated in a March 1990 report that

> [Steiner's] counseling sessions helped to reduce her stress level and enabled her to cope with the situation at work. Eventually, though the stress became too much and it was necessary for her to terminate employment at the Showboat. This has benefited her greatly in reducing her stress level.

Pl. Ex. 10. The Showboat has filed a Motion to Strike this report on the grounds that the report is not an affidavit made on personal knowledge and states only Vandermark's opinion, without supporting facts.

Even though Rule 705 of the Federal Rules of Evidence permits an expert to testify to an opinion in the context of a motion for summary judgment, an expert

must back up his or her opinion with specific facts. United States v. Various Slot Machines on Guam, 658 F.2d 697, 700 (9th Cir. 1981). In Various Slot Machines, one "expert" concluded that certain machines were not gambling machines, but were electronic point makers. The expert said the machines did not have slots for the insertion of coins and did not have a return of jackpots or other awards. Yet, the government introduced photographs that showed slots and trays on the machines. The Ninth Circuit held that the conflict between the expert's affidavit and the government photographs was not a genuine one. Without facts to support the expert's conclusion, the government was entitled to summary judgment. Id. at 700-01.

The Showboat argues that the

conflict here between Vandermark's report and the Showboat's contention that Steiner was not constructively discharged is not a real one because Vandermark had no knowledge about Steiner's quitting. In her deposition, Vandermark stated that Steiner never discussed her termination with Vandermark and did not know the circumstances surrounding Steiner's leaving. In the two appointments before she quit, Steiner had told Vandermark that her sense of humor was returning and that her stress was being reduced, and that her anxiety was much improved. Vandermark did not see Steiner between December 19, 1989 and February 20, 1990; Steiner quit February 1, 1990. The first page of Vandermark's report refers to continuing verbal assaults by Showboat casino executives and continuing sexual

harassment. The evidence clearly indicates that Steiner was not verbally assaulted in any way after the incident with Trenkle, nor does Steiner allege she was subjected to sexual harassment after that time. Moreover, Vandermark testified that even if Steiner was lying to Vandermark, Vandermark would not have changed her opinion of Steiner and her problems.

While it is true that Vandermark was Steiner's counselor and may be able to conclude that Steiner suffered from work related stress, the court finds that Vandermark had absolutely no factual basis for concluding that Steiner had to quit because the stress became too much for her. Vandermark did not discuss Steiner's termination with her, and the conclusions in her report do not create a

genuine conflict with the undisputed facts in this case. Vandermark's report and the reference to it in Attorney Segerblom's affidavit should be stricken.

Finally, even if the court were to accept Vandermark's conclusion that Steiner quit her job because of stress, there is still insufficient evidence in this case "of any aggravating factors or differential, discriminatory or retaliatory treatment by [the Showboat] from which a rational trier of fact could conclude that [Steiner's] working conditions were so 'difficult or unpleasant' or 'intolerable' that a reasonable person would have been compelled to quit." See Thomas, 877 F.2d at 1434.

C. Intentional Infliction of Emotional Distress

Under Nevada law, to make out a prima facie case of intentional infliction of emotional distress a plaintiff must prove (1) that the defendant's conduct was extreme and outrageous; (2) that the defendant either intended or recklessly disregarded the causing of emotional distress; (3) that the plaintiff actually suffered severe or extreme emotional distress; (4) that the defendant's conduct actually or proximately caused the distress. Nelson v. City of Las Vegas, 99 Nev. 548, 665 P.2d 1141, 1145 (1983). Summary judgment on a claim for intentional infliction of emotional distress is proper if a claim cannot "'reasonably be regarded as so extreme and outrageous as to permit recovery.'" Schneider v. TRW, Inc., 938 F.2d 986, 992 (9th Cir. 1991) (quoting

Trerice v. Blue Cross of California, 209 Cal.App.3d 878, 883, 257 Cal.Rptr. 338, 340 (1989)) (further citations omitted). A defendant is subject to liability only where the conduct complained of has been so outrageous in character and so extreme in degree "as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Restatement (Second) of Torts §46, Comment d (1965). "'Ordinarily mere insulting language, without more, does not constitute outrageous conduct.'" Schneider, (quoting Cole v. Fair Oaks Fire Protection Dist., 43 Cal.3d 148, 155 n.7, 729 P.2d 743, 746 n.7, 233 Cal.Rptr. 308, 312 n.7 (1987)).

Trenkle's comment, while undeniably rude and offensive, did not rise to the

level of outrageous conduct. The comment was clearly made in the heat of anger, and while certainly profane, cannot be said to exceed all bounds usually tolerated in a civilized society. Indeed, Steiner herself, when she lost her temper with John Snow, told him to "Get the fuck out of the pit." In Schneider, the plaintiff had pointed to two incidents in support of her claim of intentional infliction of emotional distress. On one occasion, her supervisor "screamed and yelled" at her in the process of criticizing her performance, threatened to throw her out of the department and made gestures she interpreted as threatening. On the second occasion, her supervisor yelled and screamed while upbraiding her for a work mistake for which she did not feel

responsible. The Ninth Circuit held that while these incidents may show rudeness and insensitivity, they do not amount to outrageous behavior. Id. at 992.

Nor do the Showboat's actions of changing Steiner's shift and giving her some low marks on her performance evaluation rise to the level of outrageous behavior. As discussed supra, the evidence clearly indicates that the Showboat had legitimate reasons for taking such actions and that such conduct was in no way discriminatory. Moreover, such conduct, even if not justified, would not rise to the level of outrageous behavior required to support a claim. See e.g. Candelore v. Clark County Sanitation District, 752 F. Supp. 956 (D. Nev. 1990) (summary judgment granted on intentional infliction of emotional

distress claim where actions of defendant included demoting plaintiff, giving her inferior equipment, involuntarily transferring her, denying her consideration to work overtime and taking away her key to the main building when she was transferred to a different building, all while employers were aware that plaintiff was subject to depression from work related stress), aff'd 1992 U.S. App. Lexis 21173 (9th Cir. 1992). The actions of Trenkle and of the Showboat cannot reasonably be regarded as so extreme or outrageous as to support a claim for intentional infliction of emotional distress.

Accordingly, for the reasons above stated,

IT IS ORDERED that Defendant's Motion for Summary Judgment (#33) is

granted.

IT IS FURTHER ORDERED that Defendant's Motion to Strike Paragraph 11 of Affidavit of Richard Segerblom and Exhibit 10 to Opposition (#39) is granted.

IT IS FURTHER ORDERED that Defendant's Motion to Strike Jury Demand (#27) is denied as moot.

DATE: 23 Sept 1993

[signed]
LLOYD D. GEORGE
Chief United States
District Judge